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IN THE

Supreme Court of the United States

NOVEMBER TERM, 1963

No. 562

MILTON E. SPATT,

Appellant,

v.

THE CITY OF NEW YORK, LAWRENCE E. GEROSA, as Comptroller of the City of New York, HILDA G. SCHWARTZ, as Treasurer of the City of New York and WILLIAM LEFKOWITZ, as Warrant Agent of the City of New York,

Appellees.

ON APPEAL FROM THE COURT OF APPEALS OF THE STATE OF NEW YORK

MOTION TO DISMISS APPEAL

LEO A. LARKIN,
Corporation Counsel,
Counsel for Appellees,
Municipal Building,
New York 7, N. Y.

STANLEY BUCHSBAUM,
SOLOMON PORTNOW,
of Counsel.

INDEX

	PAGE
Preliminary Statement	1
Statutes and Regulations Involved	2
Statement of the Case	3
Facts	4
POINT I—The challenge to the constitutionality of the New York City use tax and Article 42 of the Comptroller's Regulations presents no substantial federal question either under the Commerce Clause or the Due Process Clause of the Federal Constitution	4
POINT II—The different tax treatment of trade-ins under the compensation use tax and the sales tax as applied to wholly local transactions and transactions occurring outside the City but within the State of New York is based on reasonable distinctions and does not deny the equal protection of the laws	6
Conclusion	10

CASES CITED

Alaska Fish Co. v. Smith, 255 U. S. 44, 48-49 (1921)	5
Allied Stores of Ohio v. Bowers, 358 U. S. 522 (1959)	8
American Sugar Refining Co. v. Louisiana, 179 U. S. 89, 95 (1900)	8
Bell's Gap Railroad Co. v. Pennsylvania, 134 U. S. 232 (1890)	7

PAGE

Bode v. Barrett, 344 U. S. 583, 585 (1953) 5

Carmichael v. Southern Coal & Coke Co., 301 U. S. 495, 511 (1937) 8

Citizens' Telephone Co. v. Fuller, 229 U. S. 322, 329 (1913) 7

Colgate v. Harvey, 296 U. S. 404, 419-422 (1935) 8

Commonwealth v. Smith, 75 Dauph. 22 (Pa. CP., 1960) 5

Florida Avocado Growers v. Paul, 373 U. S. 132, 152-156 (1963) 10

Fox v. Standard Oil Co., 294 U. S. 87, 99-100 (1935) 5

Gregg Dyeing Co. v. Query, 286 U. S. 472 (1932) 3, 9, 10

Haavik v. Alaska Packers Assn., 263 U. S. 510, 515 (1924) 8

Halliburton Oil Well Cementing Company v. Reily, 373 U. S. 64 (1963) 3, 4, 10

Hart Refineries v. Harmon, 278 U. S. 499, 502 (1929) 7

Henderson Bridge Co. v. Henderson City, 173 U. S. 592, 614-615 (1899) 5

Kidd v. Alabama, 188 U. S. 730, 732 (1903) 8

Klein v. Board of Supervisors, 282 U. S. 19, 22-23 (1930) 8

Lawrence v. State Tax Comm., 286 U. S. 276 (1932) 7, 9

Lindsley v. Natural Carbonic Gas Co., 220 U. S. 61, 78 (1911) 7

Madden v. Kentucky, 309 U. S. 83, 88-90 (1940) 8

Magnano Co. v. Hamilton, 292 U. S. 40, 44 (1934) 5

Magoun v. Illinois Trust & Savings Bank, 170 U. S. 283, 293 (1898) 7

PAGE

Metropolitan Co. v. Brownell, 294 U. S. 580, 584-585 (1935) 9

Mullaney v. Anderson, 342 U. S. 415 (1952) 8, 9

N. Y. Rapid Transit Corp. v. City of New York, 303 U. S. 573, 578 (1938) 7

Norton Co. v. Dept. of Revenue, 340 U. S. 534, 537-538 (1951) 9

Quong Wing v. Kirkendall, 223 U. S. 59, 62 (1912) .. 8

Rast v. Van Deman & Lewis, 240 U. S. 342, 357 (1916) 7, 9

Southwestern Oil Co. v. Texas, 217 U. S. 114, 126-127 (1910) 7

Travellers' Ins. Co. v. Connecticut, 185 U. S. 364 (1902) 8

United States v. Sanchez, 340 U. S. 42, 44 (1950).... 5

Watson v. State Comptroller, 254 U. S. 122, 125 (1920) 8

STATUTES CITED

State Enabling Act (Chapter 873 of the Laws of 1934, as amended [McKinney's Unconsolidated Laws, § 9431]) 6

LOCAL LAWS CITED

Title M, Art. 2 of Chapter 41 of the Administrative Code of the City of New York 2

Title N of Chapter 41 of the Administrative Code of the City of New York 2

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The City of New York, Lawrence E. Gerosa, as Comptroller of the City of New York, Hilda G. Schwartz, as Treasurer of the City of New York and William Lefkowitz, as Warrant Agent of the City of New York,

Appellees.

On Appeal from the Court of Appeals of the State of New York

MOTION TO DISMISS APPEAL

Preliminary Statement

The petitioner has appealed from a judgment of the Court of Appeals of the State of New York, dated May 2, 1963, unanimously affirming an order and judgment of the Appellate Division of the Supreme Court of that State, which Court had unanimously reversed an order and judgment of the New York Supreme Court.

The memorandum opinion of the Court of Appeals is officially reported in 13 N Y 2d 618. The opinion of the Appellate Division is officially reported in 14 A D 2d 30 and the opinion of the Supreme Court in 24 Misc 2d 978. All of these opinions are set forth in Appendix A of the appellant's jurisdictional statement.

By this appeal the appellant challenges the constitutional validity of the tax treatment of traded-in cars under the New York City Compensating Use Tax Law. Under this law, which is applied equally to all New York City residents, the use tax is computed on the entire purchase price, including the value of a traded-in article, where property is purchased outside the City but within the State of New York and brought into the City and used here. Under the New York City Sales Tax Law, the tax is not applied to the value of the trade-in, but only to the cash payment made where the transaction occurs within the territorial limits of New York City. The appellant contends that the tax, to the extent that it is applied differently under the two tax laws, is repugnant to the Equal Protection and Due Process Clauses of the Federal Constitution.

Appellees move to dismiss the appeal on the ground that it does not present a substantial federal question.

Statutes and Regulations Involved

The laws imposing the Use Tax and the Sales Tax and the Regulations of the Comptroller of the City of New York issued thereunder are set forth in Appendix B of appellant's jurisdictional statement. The local law of the City of New York imposing the Compensating Use Tax is Title M, Art. 2 of Chapter 41 of the Administrative Code of the City of New York; the local law imposing the Sales Tax is Title N of Chapter 41 of the Administrative Code of the City of New York.

Statement of the Case

This action was brought by the appellant for a declaratory judgment declaring that the different tax treatment of traded-in cars under the New York City sales tax and compensating use tax and the regulations promulgated thereunder violates the Equal Protection, Due Process and the Privileges and Immunities clauses of the Federal Constitution. After issue was joined, both sides moved for summary judgment.

The trial court granted appellant's motion, denied appellees' motion and entered an order and judgment declaring the use tax unconstitutional as applied to a trade-in transaction occurring outside the City of New York. Upon appeal, the Appellate Division, Second Department, unanimously reversed the order and judgment of the trial court. The New York Court of Appeals unanimously affirmed the decision of the Appellate Division.

The Appellate Division wrote an opinion and the Court of Appeals wrote a memorandum opinion. Both held that there was a reasonable basis for the different tax treatment by reason of the greater cost of enforcing the compensating use tax and the greater likelihood of the resale of the used car within the City. The trial court wrote an opinion and held the different tax treatment unconstitutional because it was predicated upon reasoning that is "speculative."

In all courts, appellant relied upon *Gregg Dyeing Co.* v. *Query*, 286 U. S. 472 (1932). On this appeal, appellant relies principally on the *Gregg* case and on *Halliburton Oil Well Cementing Company* v. *Reily*, 373 U. S. 64 (1963). It is conceded that interstate commerce is not involved in the instant case.

Facts

Appellant, a resident of New York City, purchased a Lincoln automobile in the City of Long Beach, State of New York, for $8,250 and brought it back with him for use within New York City (fols. 41 42, 87-88, 124). In making the purchase, appellant traded in his used car and received a credit of $4,900 therefor (fol. 66, Exh. A, opp. p. 18, Rec.). He paid the balance of $3,350 in cash (*ibid.*).

Instead of paying compensating use tax on the full amount of the purchase price as required by the local tax law and the regulations, appellant paid a use tax of $100.50 computed on the cash amount alone (fol. 42). Consequently, the Comptroller of the City of New York assessed appellant for use tax due on the balance of the purchase price, viz.: $4,900.

We concede that had the appellant made this type of purchase either within the City of New York or outside the State of New York, the sales tax would have been computed only on the cash consideration paid.

POINT I

The challenge to the constitutionality of the New York City use tax and Article 42 of the Comptroller's Regulations presents no substantial federal question either under the Commerce Clause or the Due Process clause of the Federal Constitution.

(1)

Appellant relies upon *Halliburton Oil Well Cementing Company* v. *Reily*, 373 U. S. 64 (1963), which held unconstitutional a use tax to the extent that it resulted in a greater tax on an out-of-state purchase than on a purchase made within the state. We concede that the New

York City use tax and Article 42 of the Comptroller's Regulation can not be applied to an out-of-state transaction involving a traded-in car. In such a case, the City's tax would have to be computed on the cash consideration alone, in the same manner as in the case of a similar local purchase occurring within the territorial limits of New York City.

The case at bar, however, does not involve an out-of-state purchase. It involves an intrastate transaction and, hence, the Commerce Clause is inapplicable.

So, too, the case of *Commonwealth* v. *Smith*, 75 Dauph. 22 (Pa. Ct., 1960), upon which appellant relies, is inapposite because it involved an out-of-state purchase. Hence, no substantial federal question is presented under the Commerce Clause.

(2)

Nor does appellant's argument that the City's use tax and Article 42 of the Regulations as applied to an intrastate transaction violate the Due Process clause, present any substantial federal question.

This Court has held that the Due Process clause may not be used to cut down the sovereign power of a state to tax unless, in substance and effect, that power is used merely as a subterfuge for the exercise of a different and forbidden power. *Bode* v. *Barrett*, 344 U. S. 583, 585 (1953); *Magnano Co.* v. *Hamilton*, 292 U. S. 40, 44 (1934); *Henderson Bridge Co.* v. *Henderson City*, 173 U. S. 592, 614-615 (1899). See, also, *Fox* v. *Standard Oil Co.*, 294 U. S. 87, 99-100 (1935). Nothing less than complete subversion of the taxing power will warrant judicial interference with this clause. And this is so even though refusal to strike down a tax under the due process clause might result in destroying a particular business. *Alaska Fish Co.* v. *Smith*, 255 U. S. 44, 48-49 (1921). *Cf. United States* v. *Sanchez*, 340 U. S. 42, 44 (1950).

Clearly, it is the taxing power and no different or forbidden power which is involved in the New York City use tax law assailed by appellant. The use tax was enacted as an exercise of the taxing power. It was not motivated by any purpose other than to impose a tax and to protect the municipality's sales tax revenue.

POINT II

The different tax treatment of trade-ins under the compensating use tax and the sales tax as applied to wholly local transactions and transactions occurring outside the City but within the State of New York is based on reasonable distinctions and does not deny the equal protection of the laws.

(1)

At the outset it should be noted that Article 42 of the Regulations is in accord with the local tax statutes and that the tax laws themselves are within the authority of the State Enabling Act (Chapter 873 of the Laws of 1934, as amended [McKinney's Unconsolidated Laws, § 9431]). This is the holding of the New York Court of Appeals in the case.

Thus the different tax treatment is valid under State law. It remains to be demonstrated that the different treatment is based upon reasonable distinctions sanctioned under the Equal Protection clause.

(2)

It might be emphasized that appellant is a resident of New York City. The sales tax-use tax scheme embraced by the local legislation accords the same treatment to all New York City residents. Thus, to the extent that appellant was required to pay use tax on the full consideration of the new car, without deducting the value of the traded-in automobile because the purchase was made in an ad-

joining county but within the State of New York, he was treated no differently than other New York City residents. Had he purchased the automobile within the City of New York, the sales tax would have been computed on the cash consideration alone, the same as for other residents.

It is well settled by this Court that the equality demanded under equal protection is that persons and property in the same class must be treated alike. Equality between different classes is not constitutionally required. *Hart Refineries* v. *Harmon*, 278 U. S. 499, 502 (1929); *Magoun* v. *Illinois Trust & Savings Bank*, 170 U. S. 283, 293 (1898). Under this aspect of the case, no substantial federal question is presented with respect to the class of persons or the property to which the different tax treatment is applied.

(3)

It is axiomatic that a tax classification is not arbitrary if any state of facts reasonably can be conceived that would sustain it. *N. Y. Rapid Transit Corp.* v. *City of New York*, 303 U. S. 573, 578 (1938). In taxation there is a broader power of classification than in some other exercises of legislation. *Citizens' Telephone Co.* v. *Fuller*, 229 U. S. 322, 329 (1913). Hence, if any reasonable purpose for the different tax treatment *could* have been in the minds of the legislators at the time that the statute was enacted, the tax law will be upheld. *Rast* v. *Van Deman & Lewis*, 240 U. S. 342, 357 (1916); *Lindsley* v. *Natural Carbonic Gas Co.*, 220 U. S. 61, 78 (1911); *Bell's Gap Railroad Co.* v. *Pennsylvania*, 134 U. S. 232 (1890); *Lawrence* v. *State Tax Comm.*, 286 U. S. 276 (1932).

It is not necessary that the purpose be known with any certainty, nor need it be declared by the legislature. *Southwestern Oil Co.* v. *Texas*, 217 U. S. 114, 126-127 (1910).

In the case at bar it is conceivable that the legislature reasonably might have had in mind any of the following considerations in providing different tax treatment for out-

of-city trade-in transactions:

(1) the greater expense and trouble of collecting the use tax, as compared with the comparatively simple procedures for enforcing the sales tax, since local vendors are required to register with the Director of Finance, file quarterly returns and submit to periodic audit, whereas out-of-city vendors are not. *Madden* v. *Kentucky*, 309 U. S. 83, 88-90 (1940); *Carmichael* v. *Southern Coal & Coke Co.*, 301 U. S. 495, 511 (1937);

(2) to equalize or adjust the tax burdens .Thus, a purchase within New York City involving a trade-in normally results in two sales tax payments, *i.e.*, on the original transaction and again when the trade-in is resold in the City. Both add up to one full tax. The same purchase made outside the City normally results in a single use tax payment because the trade-in, normally, is resold outside the City, with no tax revenue accruing to the City. Thus, in effect, the different treatment under the use tax and the sales results, in each instance, in the realization by the City of one full tax. *Colgate* v. *Harvey*, 296 U. S. 404, 419-422 (1935); *Travellers' Ins. Co.* v. *Connecticut*, 185 U. S. 364 (1902); *Watson* v. *State Comptroller*, 254 U. S. 122, 125, (1920). See, also *Kidd* v. *Alabama*, 188 U. S. 730, 732 (1903); *Klein* v. *Board of Supervisors*, 282 U. S. 19, 22-23 (1930).

(3) to encourage local business or to promote local interests. Clearly, a lower tax on a transaction had within the City provides a strong incentive to use the local market and thus encourages local business. *American Sugar Refining Co.* v. *Louisiana*, 179 U. S. 89, 95 (1900); *Quong Wing* v. *Kirkendall*, 223 U. S. 59, 62 (1912); *Haavik* v. *Alaska Packers Assn.*, 263 U. S. 510, 515 (1924); *Allied Stores of Ohio* v. *Bowers*, 358 U. S. 522 (1959);

(4)

Appellant's reliance upon *Mullaney* v. *Anderson*, 342 U. S. 415 (1952), to support the view that it was incumbent

upon appellees to adduce evidence of higher enforcement costs is ill-founded. In a constitutional attack on a tax statute, the burden of proof is on the party seeking to invalidate the law. Where the record is silent, the Court is not required to assume facts to the contrary or that there are no facts that reasonably can be conceived to furnish the rational basis for the legislative action. *Lawrence* v. *State Tax Commission*, 286 U. S. 276, 283 (1932); *Metropolitan Co.* v. *Brownell*, 294 U. S. 580, 584-585 (1935). The burden is never met merely by showing a fair difference of opinion which as an original matter might have been decided differently. *Norton Co.* v. *Dept. of Revenue*, 340 U. S. 534, 537-538 (1951). As stated by this Court in *Rast* v. *Van Deman & Lewis*, 240 U. S. 342 (1916) (at p. 357):

> "It makes no difference that the facts may be disputed or their effect opposed by argument and opinion of serious strength. It is not within the competence of the courts to arbitrate in such contrariety. *Chi., Burl. & Quincy R. R.* v. *McGuire*, 219 U. S. 549; *German Alliance Ins. Co.* v. *Kansas*, 233 U. S. 389, 413, 414; *Price* v. *Illinois*, 238 U. S. 446, 452."

In the *Mullaney* case the taxpayer met the burden by interrogatories and cross-examination, which resulted in a specific disclaimer by the Tax Commissioner of any knowledge of the dollar cost of enforcement (342 U. S. at pp. 418-419). Not so in the case at bar. Moreover, the *Mullaney* case is otherwise inapposite because it involved an interstate transaction which was decided under the Privileges & Immunities clause, Art. IV, § 2, and not under the Equal Protection clause (342 U. S. at p. 417).

(5)

The appellant asserts that "the standard for discrimination" under the Commerce Clause and under the Equal Protection Clause "are equal and co-terminus" (Juris. St., p. 8). It cites *Gregg Dyeing Co.* v. *Query*, 286 U. S. 472 (1932), in support of this proposition. Based on this as-

sumption, the conclusion is reached by the appellant that the holding in the *Halliburton* case that there was discrimination barred by the Commerce Clause is determinative of the equal protection question in the case at bar.

Invalid discrimination under the Commerce Clause, however, is not the equivalent of a denial of equal protection of the laws. The *Gregg* case does not so hold. That case upheld the tax and, after stating why the tax did not discriminate against interstate commerce, stated that the same reasoning showed that there was no denial of equal protection (286 U. S. at p. 482). It may well be that discrimination which denies equal protection will, when applied to interstate commerce, necessarily constitute discrimination violative of the Commerce Clause, but it does not follow that the converse is true. That it is not is shown by the recent case of *Florida Avocado Growers v. Paul*, 373 U. S. 132, 152-156 (1963), where this Court rejected the equal protection attack, but, nevertheless, held that a new trial was required with regard to the issue whether there was discrimination against interstate commerce.

CONCLUSION

The appeal to this Court from the judgment of the Court of Appeals of the State of New York should be dismissed.

November 1, 1963.

Respectfully submitted,

LEO A. LARKIN,
Corporation Counsel,
Counsel for Appellees,
Municipal Building,
New York 7, N. Y.